Supreme Court of the United States

OCTOBER TERM, 1931—No. 185.

BALTIMORE & PHILADELPHIA STEAMBOAT COMPANY and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

AUGUSTUS P. NORTON, Deputy Commissioner for Third Compensation District of United States,

and

EMIL BRUNO GUBE,

Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING.

Baltimore & Philadelphia Steamboat Company, one of the petitioners herein, prays that a rehearing be granted on the matter decided in the opinion of this Court of January 11th, 1932, modifying a decree of the Circuit Court of Appeals of the Third Circuit.

The case was argued on December 11, 1932. The respondents did not appear and the Government declined to argue the merits.

Jurisdiction.

This petition was filed under Section 33 of the Rules of this Court. Power to grant a rehearing is inherent in this Court.

Statutes Involved.

This involves original construction of the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C., s. 908. That section is Sec. 8 of the Act.

Three subdivisions of that section were involved. Roughly, these subdivisions are as follows: subdivision (b), covering the category of *temporary total disability* giving compensation for the complete duration thereof; subdivision (c), covering *permanent partial disability* and giving partial compensation for an arbitrary period—312 weeks in this case.

Paragraph 22 of subdivision (c) covers the *combination* of temporary total disability and permanent partial disability resulting from the same injury and provides a complete measure of compensation within its own words except insofar as it specifically refers to Section (c).

The employee had already received his compensation. This proceeding was brought to review the award.

Question Presented.

The question for decision was the amount of compensation which should have been awarded to an employee who had temporary total disability of 34 weeks, and, in addition thereto, had been left with a 40% permanent disability of his arm.

The Decision.

The Court held that the employee was entitled to the full rate of $24.04 for 32 of the 34 weeks during which he was totally disabled and in addition was entitled to the proportionate rate of $9.616 for 282 weeks. The figure of 282 weeks was arrived at by deducting the 32 weeks of total disability already awarded the full rate from the 312 weeks allowed by statute for the loss of an arm and adding to the result the two weeks of temporary total disability, which had not been awarded the full rate. The proportionate rate, $9.616, was arrived at by taking 40% of the full rate, $24.04.

Stated in terms of rates, the petitioner's contention is that the employee should have received the proportionate rate of $9.616 for the total of 314 weeks. He is not entitled to the full rate for any of the period. The period itself is indivisible.

The petitioner's contention, stated in terms of periods, is that Gube should have received the full rate of $24.04 for 125.6 weeks. This figure is arrived at by taking the 312 weeks expressly allowed for the loss of an arm, adding thereto the 2 weeks allowed for by Sec. 8 (c) (22), making a total of 314 weeks, and taking 40% of that total because Gube had only a 40% loss of use of his arm.

Stated in terms of rates, the difference between this court's decision and the petitioner's contention is that the court has allowed a full rate for 32 of the weeks and the proportionate rate for the balance, whereas the petitioner has allowed the proportionate rate for the entire period.

This court awarded the full rate for 32 weeks, because it said that the statute contemplated that there should

be a separate award for temporary total disability and an additional separate award for permanent partial disability.

The petitioner contended that the proportionate rate should be awarded for the whole number of weeks because the act did not intend to award anything for temporary total disability as such. Instead, the act contemplated that where there was a combination of injuries, the employee should receive only the proportionate rate for the full schedule period. The schedule period has no divisions such as 32 weeks and 280 weeks. It is one integral period.

The question, therefore, was whether Sec. 8 (c) (22) and Sec. 8 (b) are supplemental to each other, as the court found, or whether they are independent of each other as petitioner contends.

Reasons for Granting a Re-hearing.

This petition is in furtherance of the purpose of this court to establish principles for the construction of this act. The present opinion upsets commonly accepted principles and conflicts with the decision of the Court of Appeals of New York. It is contrary to the decision of the Circuit Court of Appeals for the first circuit in *Bethlehem Shipbuilding Corporation, Ltd.* v. *Patrick Monahan* (not yet reported) decided since this case was argued. A copy of this opinion is annexed hereto (pp. 20-23).

Inasmuch as there was no argument for the United States, and inasmuch as the decision of this court went beyond the scope of petitioner's argument, we submit that reargument should be had in order that no doubt may remain as to the advertence of all of the conclusions of the opinion.

Reargument is asked on the following specific grounds:

1. The court has misunderstood the contention of the petitioner.

2. The court has distinguished *Marhoffer* v. *Marhoffer*, 220 N. Y. 543, because of a misunderstanding of that decision and the New York law on which it was based.

3. The court did not appreciate the legislative theory of the New York Act on which the Federal Act was modelled.

4. The decision has left in doubt the proper method of administering the act. It is not known whether commissioners are bound to award proportionate rates for full periods or full rates for proportionate periods.

It is believed that the court has reached its decision by reason of an approach to the question on a theory which was not argued before the court, nor in any of the lower courts. It is believed that if there were a re-hearing it could be shown that the theory adopted by the court is erroneous in view of the history of the compensation legislation. The court's theory is that the Federal Act deals with full periods and proportionate rates but that the New York Act on which the Federal Act was modelled deals with proportionate periods and full rates.

By reason of this theory and the manner in which it was applied, the position of the petitioner has been misunderstood.

1. *The petitioner's position.*

The court said, with respect to the petitioner's contention:

"And they contend that if claimant had not been totally disabled for more than 32 weeks he would not have been entitled to any allowance at the full rate on account of the temporary total disability, but only to the proportionate rate for the entire period, or, according to the method of computation adopted, the full rate for the proportionate number of weeks. And they argue that it is inconsistent to hold that, merely because total disability continued two weeks in excess of the prescribed healing period, claimant was entitled to an allowance at the full rate for the period of total disability."

From this language it is gathered that the court has considered the petitioner's contention as one having to do with whether a proportionate rate or a full rate should be applied in determining the compensation for the period of total disability during the 32 week healing period.

The petitioner's contention was not directed at all to that matter. The petitioner does not attempt to give any compensation for these weeks of total disability as such, either at a full rate or at a proportionate rate. It says that the only weeks considered should be the 312 weeks mentioned as the schedule in subdivision (c). These 312 weeks are not composed of 32 weeks plus 280 weeks. They have nothing to do with the 32 week period. Under the petitioner's construction the 32 weeks are not known or regarded as weeks of total disability and hence are not weeks of the healing period.

It is true that the effect of applying the proportionate rate for a total of 312 weeks can be regarded as compensating the first 32 weeks thereof at the proportionate rate and the remaining 280 also at the proportionate rate. But that is not what was intended. Congress in using 312 weeks as a schedule to determine loss by permanent partial dis-

ability was not referring to loss by total disability and the fact that 32 is less than 312, and *mathematically* included within it, does not mean that the loss by total disability was intended to be included within the schedule loss by permanent partial disability. The section (c) which gives an award of 312 weeks contemplates making no award at all on the basis of total disability. On the contrary it contemplates making awards on the basis of permanent partial disability only, and has no reference to awards made on the basis of total disability. Therefore the assignment of a proportionate rate for the whole period results in an apportionment of (c) only and the total exclusion of (b).

Under petitioner's contention the sole purpose of fixing a healing period was to determine a period in excess of it so that the excess period could be added to the periods in (c). In this case it lengthened the period from 312 to 314 weeks. Fixing a healing period does not mean that the employee is entitled to something more for that period.

When the court states that the petitioner contends that the healing period should receive the proportionate rate, the court assumes that the petitioner means to compensate for that period of total disability as such. Having made that assumption it follows, of course, that petitioner's contention is made to appear as one of compensating for that period at the proportionate rate.

The court apparently thinks that the petitioner has in mind an award of compensation for temporary total disability. The petitioner has no such thought in mind. On the contrary, it has the opposite thought, viz: that no award whatever should be made for total disability when there is a combination of both. The petitioner's contention is that no part of the irreducible 312 weeks represents a period of temporary total disability. Point 3 will show that it is a

substitute intended to give the injured man certain advantages which he would not have otherwise. That is the accepted meaning of the words in the State of New York, where the terms first originated.

2. *The Decision of Marhoffer* vs. *Marhoffer, 220 N. Y. 543, is in Point.*

The Federal Act was patterned after the New York Act. Its language is almost identical. The New York court interpreted it in a definite way in *Marhoffer* v. *Marhoffer* (*supra*). This court has interpreted the Federal Act in an entirely different way.

The court noted in its opinion that the petitioner made no point of whether the rate or the period should be apportioned and noted also that the petitioner had proceeded upon the theory that the period should be apportioned. Although the court said at one place that it made no difference in the result whether the rate or the period were apportioned, yet in distinguishing the case of *Marhoffer* v. *Marhoffer*, the court said:

"That case is not in point. There the controversy concerned the period for which payments were required to be made. Here the question is not whether the healing period shall be added to that allowed on account of partial permanent disability, but it is whether the full rate shall be allowed for the period of total disability up to the specified limit of 32 weeks."

This court has apparently overlooked the fact that in the *Marhoffer* case the court gave what was equivalent to the proportionate rate for the weeks that this court has termed the weeks of the healing period. The New York court, however, like the petitioner here, did not regard the

proportionate payments for those weeks as being intended to compensate for total disability. On the contrary, the weeks were merely mathematically included in the schedule period. Nevertheless, the *Marhoffer* case, if viewed as this court has viewed the Gube case, can be said to be directly in point because the New York court *applied the proportionate rate for the weeks of the healing period.* It is true that the New York court accomplished this by apportioning the entire schedule period and allowing the full rate for the apportioned period. This court itself, however, has pointed out in its opinion, that there is no difference in the result between the method of apportioning the rate on the one hand and the method of apportioning the period on the other.

The *Marhoffer* case can be viewed, either as one in which the period was apportioned and the full rate applied, or it can be viewed, as this court has chosen to regard the problem, viz.: as one in which the rate was apportioned and the full period was applied, which full period included the time of the temporary total disability. It can also be viewed in a third way, the way in which the court intended and the petitioner views it, viz.: as one in which the inclusion of the time of temporary total disability is a mathematical effect and in which the real intention was to compensate for a schedule period without regard to the temporary total disability.

In any event, the *Marhoffer* case is at least authority for the proposition that the act should be viewed as one involving periods and not rates, if that distinction is important.

3. *The Theory of the Federal and New York Acts.*

Irrespective of whether the *Marhoffer* case may be distinguished from the case at bar on the ground mentioned by this court in its opinion, there is this much which can be derived from the *Marhoffer* case as bearing upon the legislative history of the act passed by Congress. That case establishes that the purpose of the legislation was to award an injured man compensation for his disability, *i. e.:* inability to perform labor, and that it was not the purpose of the legislation to give compensation by way of damages for the loss or permanent injury to a leg or an arm. In estimating the amount of such compensation, the legislature provided two measuring rods. The first provided for actually counting the number of weeks that a man was unable to work. The second and alternative method was to fix a definite number of weeks according to a schedule established by the legislature, having some relation, but not an exact one, to the number of weeks during which certain permanent injuries ordinarily would render an injured man unable to work. By neither measuring rod was the injured man to receive compensation for permanent injury as such. The compensation to be given when a man had a permanent injury was either by actually counting the weeks of disablement or by using a schedule which was a legislative appraisement of the disability which certain permanent injuries would normally produce.

Therefore, in the *Marhoffer* case, the Court of Appeals of New York definitely established the rule that an injured man could not have his compensation estimated by the use of two measuring rods, *each of which was designed to measure the same thing.* In other words, there was not to be consecutive or concurrent compensation. Whether stated in rates or periods, the rule is the same.

It was not until 1924 that the Legislature of the State of New York passed Sec. 15(4)(a) which is the same as Sec. 22 (c) of the Congressional Act. When Congress passed its Act in 1927, it used almost the identical language of the New York Act. It is fair to assume, therefore, that Congress intended to pay compensation to injured men on the same basis as that on which it had been paid in New York under and by virtue of the decision in the *Marhoffer* case.

The only point at which this reasoning might be questioned at all is with regard to the effect of the amendment of 1924 to the State act. That amendment is the same as Sec. 8 (c) (22) of the Federal Act. The question is whether the New York Legislature, by fixing a healing period and giving a man compensation for the weeks in excess thereof, intended to change the fundamental purposes of the Act. The New York courts have answered this doubt. They have decided that no change was intended.

Prior to the passage of the Federal Act, it had been definitely held in New York that even after the passage of the State amendment in 1924, the purpose of the Act was still the same as before, and compensation was reckoned the same way. *Labionti* v. *Meehan & Sons,* 215 A. D. 607 (1926).

A later decision confirms the same view. *In the Matter of Joseph Pumalo* v. *Fioto,* 221 A. D. 822 (1927).

In other words, the amendment of 1924 was designed to enlarge the legislative measuring rod (schedules). It did not affect the other measuring rod which estimated the injured man's compensation by actually counting the number of weeks that he was unable to work. Nor did it intend to give him both, or a combination of both.

That was the situation when Congress passed the Federal Act in 1927. The conclusion is inescapable that Congress took the New York Act along with the decisions which interpreted its meaning. Indeed, this can be shown by a reference to Congressional debates. See *Mahony Co.* vs. *Marshall*, 46 F. (2d) 539.

It is important that the Court have in mind that Workmen's Compensation legislation of States other than New York is of a different character and has a different purpose. We refer to the Acts of New Jersey and Massachusetts. In those Acts the purpose is not only to pay the man compensation for the time that he is unable to work, but also to pay him compensation in the nature of an *indemnity* for a permanent injury. In those Acts it is expressly provided that the compensation for the permanent injury shall be added to the compensation for the actual number of weeks that the man is unable to work. As an offset to this arrangement, the schedules in those Acts are much less than the schedules under the New York Act. The loss of an arm, for instance, is 230 weeks in the New Jersey Act, in contrast to the 312 weeks under the New York Act. The difference in the schedules, it is submitted, is due to the different purpose which the legislators had in mind.

In other words, where the purpose is to award an injured man compensation for the actual number of weeks that he is unable to work, plus an indemnity for a permanent injury, the latter amount may be set at one figure. (That is the New Jersey Act.) On the other hand, when the purpose of the legislature is to give only compensation for the number of weeks that a man is unable to work, but determinable by two methods, one by actually count-

ing the number of weeks, and the other by legislative appraisement, then the latter must, in the opinion of the Legislature, have some relation to what a given injury will produce in terms of actual disability. The legislative appraisement of *disability* under the New York Law is, therefore, much greater in number of weeks than the legislative definition of the extent of an *indemnity* for injury under the laws of New Jersey. Therefore, adding an award for permanent disability to an award for temporary total disability, *whether the latter is based upon a proportionate rate or not,* is wholly at variance with the purposes of the New York legislation or any Act patterned upon it.

Congress definitely considered and rejected the New Jersey law. *Mahony* v. *Marshall* (*supra*). Instead, Congress adopted the New York Act. By its decision in this case, this court has imposed upon the petitioners the burden of the heavy schedule losses fixed by the New York legislation, but has deprived the petitioners of the interpretation which made such heavy schedules equitable. It has coupled the feature of two-fold compensation of the New Jersey law with the heavy schedule feature of the New York law. Congress discriminated between the two when it adopted the New York law with its established judicial interpretation.

Viewed in the light of the purpose of the legislation, there are not, nor can there be, any harsh results to an injured man by the adoption of the interpretation of the Federal Act for which the petitioners have contended. In particular, we respectfully submit, the harsh result referred to by the court in the following language does not and cannot happen:

"Petitioners' construction would produce incongruous results in many cases. Indeed a decision cited by them, Texas Employers' Ins. Ass'n *v.* Sheppeard, 32 F. (2d) 300, concretely illustrates such a result. On that basis, whenever the temporary total disability of an arm continued during the full time allowed for healing and the subsequent permanent partial loss of its use was not more than 10 per cent., the injured employe would receive less than if he had suffered only the temporary total disability. Thus petitioners' construction would deny any allowance for the permanent injury. If in this case claimant's permanent partial loss of use of his arm had not been more than 10 per cent., petitioners' calculation would give him compensation for only 31.4 weeks whereas without any permanent disability he would be paid for 32 weeks. Similar inconsistencies arise where an injury of any member listed in the schedule contained in subdivision (c) resulted in temporary total disability followed by relatively small permanent partial loss of its use. It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the act."

Indeed, as a practical matter, no man can ever receive for his compensation less than the actual number of weeks that he is unable to work.

The situation of a man having 32 weeks total temporary disability and whose compensation is reduced to 31.4 weeks, because he has in addition thereto a permanent partial disability, does not and cannot exist *in fact*. It can exist *in theory* if the problem of his compensation is viewed as one having to do with an estimation of what a theoretically injured man would receive under the Act rather than a problem in accounting as to what a man shall receive (in excess of the payments he has already received for actual

total disability) to compensate him for the residual disability arising from a permanently injured member.

An injured man actually receives compensation in dollars and cents during the period of his total disability. The Act requires that he be paid every two weeks. Sec. 14 (b):

"Sec. 14 (b). The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period."

When his period of actual total disability is ended, then, and then only, can the extent of his permanent partial disability be estimated. But he has already received his payment for his total disability in full and the inquiry then is not whether he shall receive *less* by reason of the existence of a permanent partial disability, but whether he shall receive *more*. If he is to receive more, the inquiry is how much more. *That is the present controversy.* The contention of the petitioners is that, if he is going to receive more compensation after he has already received his compensation for his actual total disability, he can receive it only on the basis of the legislative measuring rod mentioned in Sec. 22 (c), and that that measuring rod is unaffected by the provisions of the measuring rod which envisages simply the actual time that the man was wholly unable to do any work. What he has already actually received for that period cannot be taken away from him. It is simply a debit against the greater amount which is to be awarded by the use of the other measuring rod.

Viewed thus, the provisions of Sec. 22 (c), etc., are a measuring rod by which the injured man can be given additional compensation provided his case is of such a nature as to result in additional compensation by the use of that method of estimating it. If the use of that method does not result in a compensation greater than the amount that the man has already received for his total disability, it is because his amount of permanent partial disability is small or because his total disability does not exceed the healing period, or because of both reasons. Can it be said that having in mind the fundamental purpose of the Act, the result produced is strange and unfair?

If the matter is regarded from the point of view of a theoretically injured man, instead of from that of a man actually injured, the unseemly result pointed out by the Court is no more to be escaped under the rule laid down by the Court than under the rule contended for by the petitioners. We may assume that Gube, instead of being totally disabled for a period of 34 weeks, was disabled for a period of 50 weeks and had only a one per cent permanent disability. If he had just a total disability, he would have received in compensation 50 x $24.04, or $1,202. But by reason of having the one per cent permanent partial disability to his arm, it results from the rule laid down by the Court that he would receive 32 weeks at $24.04 and also 1% of $24.04 x (312 plus 18 — 32), which results in $840.92. This would "require payment of more compensation for a lesser disability than for a greater one including the lesser".

The same result will ensue with a greater percentage of permanent partial disability in every case where the temporary total disability is greater than the 50 weeks assumed here.

Viewed in the light of what would happen to a man actually receiving such an injury, such a result could not and would not occur. The man would receive 50 weeks at the full rate of compensation before any consideration would or could be given as to how much he should receive in addition thereto by reason of his being left with a permanent partial injury. Neither on the Court's interpretation of the Act, nor on that of the petitioners', would he receive anything in addition. The implication of the Court's opinion, however, is that he would not be entitled to the $1,202 which he had actually received.

4. *The Doubt as to Future Procedure.*

There are several additional considerations of which the Court may well take cognizance in determining whether a further hearing should be granted in the matter.

The first is that under the Court's opinion it may be taken that the proper rule is to make an apportionment of the rate rather than an apportionment of the number of weeks. Since compensation under the Act is paid bi-weekly, it results in the payment to an injured man of small and probably inadequate amounts over a long period of time. It may be doubted that Congress intended such a result, for it is injurious to an employee whose compensation is fixed at two-thirds of his weekly wage in the expectation that that will approximate his standard of living and who finds his weekly compensation reduced to a percentage of even that fraction. The petitioner's counsel are advised that the Compensation Commissioner in New York is in doubt whether this Court meant to bring about this incongruous result.

Another consideration is that the Act specifically provides that in no case shall the rate of compensation be less

than $8 per week. Sec. 6 (b). The Court's decision, which seems to mean that the rate is to be apportioned rather than the period, raises the problem as to what would have to be done if the apportionment of the rate should reduce it to an amount less than $8.

It was in view of this latter section that no point was made on the argument as to whether the rate or the period should be apportioned. It was taken for granted that, in accordance with the universal practice of the Compensation Commissioners, and in view of the difficulty which would arise if the apportioned rate should be less than $8, the intention of Congress was to apportion the period rather than the rate.

It is not clear from the Court's opinion whether the interpretation of the Act from the viewpoint of apportionment of rates as opposed to apportionment of periods was meant to be determinative of the result. On the one hand, the Court has apparently reached some important conclusions by applying the rule of apportioning the rates. On the other hand, the Court has said:

"The total of the payments is the same in either case. The computation employed shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no question as to that feature of the award, and therefore we need not consider whether it is consonant with the act."

Since this matter was not suggested in any of the lower courts and was not considered crucial by the New York courts, the petitioner did not consider it a vital factor in the present case, and did not argue it.

There is also some confusion as to the meaning intended by the Court when it said at one point in its opinion:

"The provisions of (c) (22) have no bearing on the question of whether the full rate or a proportionate one shall be allowed."

and at another point said:

"The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the act, means that the *full rate* shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period."

It is respectfully submitted that the foregoing considerations merit a re-hearing.

Respectfully submitted,

IRA A. CAMPBELL,
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Counsel for Petitioner, Baltimore & Philadelphia Steamboat Company.

I hereby certify that I have examined the foregoing petition for a re-hearing.

In my opinion it is well founded and entitled to the favorable consideration of the Court. It is presented in good faith and not for the purpose of delay.

VERNON S. JONES.

APPENDIX

(Unofficial Copy.)

UNITED STATES CIRCUIT COURT OF APPEALS

FIRST CIRCUIT.

BETHLEHEM SHIPBUILDING CORPN., LTD.,

vs.

PATRICK J. MONAHAN, Deputy Commissioner, *et al.*

OPINION OF THE COURT, DECEMBER 17, 1931.

BINGHAM, C. J.—This is a suit to set aside for error in law the award of the commissioner under the Longshoremen's & Harbor Workers' Compensation Act (U. S. C., Sec. 901-905), in a case of temporary total disability and permanent partial disability, both resulting from the same injury, consisting of a total loss of hearing in the claimant's right ear.

The commissioner awarded the claimant compensation for 23 weeks and 4 days for total temporary disability from December 28, 1928 to June 9, 1929, inclusive, at the rate of $22.08 per week (66⅔ per centum of $33.12 his average weekly wage); and for 52 weeks for permanent partial disability commencing June 10, 1929, at the rate of $22.08 per week; allowing, however, as a credit thereon $517.30 paid on that account.

The provisions of the act under which the commissioner awarded compensation are found in Sec. 8 (b) and (c) (13), which reads as follows:

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

The single question in this case is whether the claimant is entitled to an award of compensation for a disability resulting from the same injury under the provision of both Sec. 8, subdivision (b) and Sec. 8, subdivision (c). (13). In other words, does the act contemplate and provide for a concurrent or consecutive compensation under these two provisions? The construction of the act in this particular and as an original question may be regarded as doubtful. It certainly presents a close question, but we do not find it necessary to pass upon it as an original proposition for it appears that the provisions of the act here in question (as well as the act itself), were taken verbatim from an act passed by the legislature of New York (N. Y. Cons. Laws, c. 67), which had a well settled construction before their adoption by Congress.

The act, when first enacted in New York, included the provision contained in Sec. 8 of the Federal Act, with the exception of paragraph 22 of subdivision (c). Paragraph (22), however, became a part of and was added to the N. Y. Act in 1924 (N. Y. Cons. Laws 1924, ch. 500); and

in 1927 Congress adopted the provisions of that act as amended in 1924, which is the act now under consideration.

In 1917, the Court of Appeals of the State of New York in the case of Marhoffer *v.* Marhoffer, 220 N. Y. 543; 116 S. E. 379, had under consideration the construction and meaning of the corresponding provision of Sec. 8 (b) and (c). At that time, it is to be remembered, the New York Act did not contain the additional provision embodied in Sec. 8 (c) 22. In construing the corresponding provisions of Sec. 8 (b) and (c), in a case that involved the loss of an arm, it was held that the claimant was not entitled to concurrent or consecutive compensation under subdivisions (b) and (c) for temporary total disability and permanent partial disability; and compensation for permanent partial disability only was awarded.

And in 1926, after the adoption of the additional provision in c-22, the Appellate Division of the Supreme Court of New York on March 3, 1926, in Labionti *v.* John Meehan & Sons, 215 A. D. 607; 214 N. Y. S. 442, reaffirmed the doctrine of the Marhoffer case holding that a claimant was not entitled to concurrent or consecutive compensation under the corresponding provision of Sec. 8 (b) and (c).

Since the adoption of the New York Act by Congress the New York courts have held to the same construction of its act, Hoffman *v.* Chatham Elec. Lt. & Power Co., 224 A. D. 799, 230 N. Y. S. 849; Gefers *v.* N. Y. Window Cleaning Co., 224 A. D. 792; Rubenstein *vs.* Pechter Baking Co., 224 A. D. 324; 230 N. Y. S. 577, all three of which cases were affirmed by the Court of Appeals in 249 N. Y. 433, 164 N. E. 341.

Such being the settled construction of these provisions of the New York Act at the time of its adoption in 1927,

it is to be presumed that Congress intended that such provisions should be understood and applied in accordance with that construction. In other words, that it adopted the act with the construction placed upon it by the New York courts. Capital Traction Co. *v.* Hof, 174 U. S. 1, 36; Henrietta Mining & Milling Co. *v.* Gardner, 173 U. S. 123, 130; Texas Employers Ins. Assn. *v.* Sheppeard, 32 F. (2d) 300; Cunningham *v.* Commr. of Banks, 249 Mass. 401, 423; Cyc. 1154 Note 81 and cases there cited.

The decree of the District Court dismissing the bill is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

District Court's opinion reported at 50 F. (2d) 457.